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In the Supreme Court of the United States

OCTOBER TERM, 1985

JAMES HINTON, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Montel v. *Weinberger*, 546 F.2d 679 ..... 2, 3

Wisor v. *Director, Office of Worker's Compensation Programs*, 748 F.2d 176 ... 2, 3, 4

Statutes:

Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* 1

30 U.S.C. 902(d) 2, 3

26 U.S.C. 4121(a) 4

26 U.S.C. 9501 4

30 U.S.C. 802(h)(2) 2, 3

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Petitioner contends that the court of appeals erred in ruling that he was not a coal miner eligible for benefits under the Black Lung Benefits Act.

1. Petitioner worked for two clay mine operators, from 1933 to 1944 and from 1947 to 1960. Neither of these operators mined coal for commercial purposes. Rather, they discarded, as a waste byproduct, coal that had been removed from their mines in the process of extracting clay. The clay mine operators allowed their employees to take the discarded coal or "gob" at no charge. Pet. App. A13.

2. Petitioner filed a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, which was granted by an administrative law judge. The ALJ found petitioner to be a coal miner on the ground that petitioner's

work involved "coal production" because "coal was taken out, separated and taken out of the mine in cars" (Pet. App. A32-A33).* The Benefits Review Board reversed, stating that "[t]he administrative law judge erred in placing controlling weight on the fact that claimant worked with coal" (*id.* at A22). The Board explained that "Congress only intended that the Act cover the coal mining industry, and not every operation in which employees come into contact with * * * coal" (*id.* at A22-A23). Because the employers produced and sold clay, and merely discarded coal as waste, the Board concluded that petitioner did not work in a coal mine (*id.* at A23).

The court of appeals affirmed (Pet. App. A12-A18). Noting that the facts were not disputed, the court applied its established test that " 'for persons employed in a clay mine to qualify for black lung benefits, coal mining must constitute at least a substantial part of the activity' " (*id.* at A16, quoting *Montel* v. *Weinberger*, 546 F.2d 679, 680 (6th Cir. 1976)). Relying on *Wisor* v. *Director, Office of Worker's Compensation Programs*, 748 F.2d 176, 179 (3d Cir. 1984), the court remarked that "an employer's lack of economic interest in coal generated in clay mining is highly relevant in

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*The Act defines "miner" as "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." 30 U.S.C. 902(d).

The term "coal mine," in turn, is defined as "an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities." 30 U.S.C. 802(h)(2).

determining whether coal mining was a substantial part of a clay miner's work" (Pet. App. A17). Based on the undisputed facts, the court upheld the Board's determination that petitioner was not a coal miner because "coal mining was not a substantial part of [his] work activity" (*id.* at A17-A18).

3. The court of appeals correctly concluded that petitioner was not a coal miner. Its decision is in accord with its earlier decision in *Montel*, and with the Third Circuit's decision in *Wisor*, the only other court of appeals decisions on this issue. Petitioner raises only a factbound claim that does not warrant further review.

To be eligible for black lung benefits, an individual must have worked in a coal mine. See 30 U.S.C. 902(d) and 802(h)(2) (note*, *supra*). A coal mine is a mine from which coal is extracted for a commercial purpose. The commercial purpose requirement derives from Congress's refusal to make black lung benefits available to workers outside the coal industry. See *Montel*, 546 F.2d at 680-681; *Wisor*, 748 F.2d at 178, 179. Here, the coal extracted along with the clay was discarded by petitioner's employers and thus the extraction of coal was not for a commercial purpose.

Petitioner does not challenge the commercial purpose criterion. Instead, he contends that the court of appeals misapplied the rule in this case, because the coal coming out of the mine "was used for commercial purposes as additional compensation and as a means of an additional livelihood" (Pet. 7). This factual contention does not warrant review by this Court. The extent to which an employee of a clay mine is permitted to use or sell discarded coal for his own financial gain has never been held to be relevant to the determination of whether the employee is a coal miner. In *Wisor*, the court rejected a similar claim, holding that, although "coal taken from the mine was * * * given to the

company's employees for their personal use" (748 F.2d at 177), nevertheless "the extraction of coal as a by-product of clay mining * * * does not bring the activity within the definition of coal mining" (*id.* at 179). Moreover, because the coal mine industry alone funds benefits paid by the Black Lung Disability Trust Fund, by paying an excise tax on coal sold by the producer (see 26 U.S.C. 4121(a) and 9501), "[i]t would create an anomalous situation if employees of a clay mine were permitted to recover benefits from [the] Trust Fund * * *." *Wisor*, 748 F.2d at 179. Therefore, the court of appeals correctly held that, even though petitioner may have used or sold coal extracted from his employers' clay mines, he was not a coal miner under the Act.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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